No. 97-430

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

ROBERT C. SHINN, JR., individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection,

Petitioner,

v.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., C & A CARBONE, INC.; NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION, NEW JERSEY CHAPTER; WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF FOR PETITIONER COMMISSIONER NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

PETER VERNIERO
Attorney General of New Jersey
Attorney for Petitioner
Commissioner of the
New Jersey Department of
Environmental Protection
Division of Law
124 Halsey Street – 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Tel.: (973) 648-7457

JAYNEE LAVECCHIA
ANDREA M. SILKOWITZ
Assistant Attorneys General
Of Counsel

GAIL M. LAMBERT
Deputy Attorney General
Counsel of Record and on the Petition

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REPLY BRIEF FOR PETITIONER COMMISSIONER NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Contrary to respondents' claims, this matter is not just a duplication of facts previously reviewed by the Court to which *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), can be blindly applied. The briefs in opposition have both tried to confuse the undisputed factual record and oversimplify the complexity and importance of the legal issues at hand. New Jersey's pending petition raises the unsettled questions of the constitutional parameters of public ownership of solid waste disposal facilities, the constitutional ramifications of the decision to monopolize those services within government rather than to privatize them, and the constitutional obligation of the federal courts when a ruling causes grave disruption to significant public interests in established institutions and subdivisions. The issue of safe disposal of solid waste has not disappeared from the national horizon simply because the Court reviewed one contractual arrangement and concomitant municipal ordinance in *Carbone*. States grapple with the very real problems of society's overproduction of waste on a daily basis. This Court needs to review the provision of this essential service through publicly controlled facilities in order to provide heretofore unavailable guidance to the states and lower courts.

1. The respondents seek to manipulate the Commerce Clause, which is intended to address economic favoritism of local commercial enterprises, *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), to run roughshod over a state system built upon a significant public investment.

Pet. App. 264-66. Just as the Court has restricted the reach of the active Commerce Clause to prevent the accumulation of excessive power in the hands of Congress and to reduce the risk of federal tyranny being visited upon the states, *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365 (1997), it is important for the Court to guard against the accumulation of too much power in its own hands through an unwarranted expansion of the dormant Commerce Clause. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, ___ U.S. ___, 117 S.Ct. 1590, 1608 (1997) (Scalia, J., dissenting) ("The Court's negative-commerce-clause jurisprudence has drifted far from its moorings.") Even with respect to the broad categories of activity that Congress may affirmatively regulate under its commerce power, there are "judicially enforceable outer limits." *United States v. Lopez*, 514 U.S. 549, 566 (1995). To allow the lower decision to stand is to permit the unfettered encroachment into the substantial areas wherein state and local government assume exclusive responsibility to provide essential services that might otherwise be addressed by the marketplace.

2. The Briefs in Opposition misinform the Court of the true public character of the system. While it is true that there are some private sub-components in most of the twenty-two district management plans, those components are all procured through open, competitive public processes, much as the napkins in a state prison are purchased by the state from a private napkin manufacturer. Similarly, respondents ignore the utility aspects of New Jersey's solid waste system and the fact that the vast majority of the county districts hold government-awarded franchises to the solid waste which give the

districts both obligations and entitlements with respect to the disposal of that waste. *Morris County Transfer Station, Inc. v. Frank's Sanitation Service, Inc.*, 260 N.J.Super. 570, 617 A.2d 291 (App. Div. 1992).[1]

Here, unlike *Carbone*, New Jersey has a "general exclusion of private firms from the market" and "a broader exclusion of private capital." *Carbone*, 511 U.S. at 418 (Souter, J., dissenting). New Jersey has admittedly opted not to privatize those franchises. As such, there is no discrimination or economic protectionism that is cognizable under the dormant reach of the Commerce Clause. Put another way, as the Court recently did in the context of another public utility service, the private waste market is not similarly situated with the government waste districts. *General Motors Corp. v. Tracy*, 117 S.Ct. 811 (1997). Further, the Court in *Wyoming v. Oklahoma*, 502 U.S. 437, 459 (1992), emphasized this constitutional dissimilarity through the disparate treatment accorded the statutory imposition of a local purchase requirement on the private electric generators and the Grand River Dam Authority. Therefore, the fact that Atlantic Coast cannot compete for the right to provide disposal services directly to generators is geographically neutral and nondiscriminatory for purposes of Commerce Clause

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[1] While solid waste collection entities have been regulated as public utilities and required certificates of public convenience and necessity in order to lawfully operate, *N.J.S.A.* 48:13A-4, those operations have never been granted exclusive rights through a franchise mechanism. Thus, respondents are correct that collection is in part provided municipally and in part provided privately. App. (1997) A-357.

analysis. *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm.*, 341 U.S. 329 (1951).

3. The political decision of New Jersey not to privatize the solid waste utility responsibility placed upon the county districts cannot be constitutionally challenged. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 560 (1987) (Brennan, J. dissenting) ("Government is free, of course, to 'privatize' some functions it would otherwise perform."); *see also Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991) ("wrongful privatization" decision reviewable under the Administrative Procedure Act unless action is committed to agency discretion by law). As all members of the Court have agreed, the provision of essential services through government creates a different field than the one on which the private sector plays. There is not one "unlevel" playing field, see Pet. App. 28, but rather very distinctive fields that are philosophically removed from one another. In the one, the public interest is served while in the other, the private gain of shareholders takes precedent. *Carbone*, 511 U.S. at 420 (Souter, J., dissenting). Local government also operates in a system that is responsible through elected officials to the voters. *Richardson v. McKnight*, ___ U.S. ___, 117 S.Ct. 2100, 2107 (1997) (effect of privatization of prison guards on § 1983 immunity). It is therefore "fanciful to speak of the consequences of 'market' pressures in a regime where public officials are the only purchaser, and other people's money the medium of payment." Id, ___ U.S. at ___, 117 S.Ct. at 2111 (Scalia, J., dissenting).

New Jersey, based upon its history and its demographic and environmental circumstances, determined in

the public interest to wholly replace the private marketplace for the provision of this essential, traditional municipal service. While New Jersey might be the first in the nation to reach this critical health and safety juncture because of those circumstances, many states will sooner or later be faced with the issues engendered by the provision of public solid waste services through bonded public facilities. Moreover, solid waste disposal is but one of the types of services provided by local authorities through bonded facilities throughout the country that are at risk of constitutional uncertainty if the decision below stands. App. (1997) A-920. Because *Carbone*'s review of a singular put-or-pay contract not supported by public bonds provides no guidance on this issue, the Court of Appeals should have broken new ground in its examination of the Commerce Clause implications of exclusive government solid waste disposal franchises.

4. The Court below admitted to the uncertainty and lack of standards generated by this Court's recent case-law on remedy and retroactivity, Pet. App. 150, and yet somehow applied those non-standards to the equities that overwhelmingly weigh in favor of allowing the State a remedial injunctive order. While the Court of Appeals indicated that a district court may retain authority to enter an equitable stay, not only do those "constitutional boundaries" remain unclarified, Pet. App. 143, 151, but it is difficult to imagine what case would ever satisfy those unspoken standards if this one does not. Without review and reversal by this Court of at least the remedial portion of the lower court's determination, the State of New Jersey cannot accomplish the important task of designing a new solution, which task has been specifically reserved

to it under our federalist system of government, *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990), without years more of litigation.[2]

The State's petition clearly seeks this Court's guidance on matters of national importance. The Court has never addressed the impact of the Commerce Clause on public solid waste facilities. *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 358-59 (1992). Moreover, the issue of how a state can reasonably fashion an effective and constitutional remedy without adequate

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[2] The emergency regulations, 29 N.J.Reg. 4170 (Sept. 15, 1997), of which respondents have been publicly critical and which they urged in the administrative hearings be scrapped in favor of a permanent legislative solution, were necessitated by the reversal of the district court's entry of a remedial order which had been based upon express findings of a grave disruption to important State interests in its absence, Pet. App. 268-70. Surely, the State would have been seriously remiss in its public responsibility of assuring the safe, adequate and proper disposal if it had failed to attempt to address the realities of the Court of Appeals very limited injunction. Now, the State is placed between a rock and a hard place by the very industry that has criticized it for the only measures that time allowed while arguing to this Court against New Jersey's right to have the remedial legislative opportunity to achieve a permanent solution that makes sense to all concerned, including, apparently, the challengers themselves. The band-aid applied to the rupture of the comprehensive system established and upheld over a period of twenty years is no substitute for the deliberate consideration by the Legislature and the Executive of the future course it wishes to offer its citizens. *Faulkner v. Jones*, 51 F.3d 440, 448 (4th Cir.), *cert. den.*, ___ U.S. ___, 116 S.Ct. 352 (1995); *see also United States v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264 (1996).

temporal provisions to do so goes far beyond the particular subject of this lawsuit. *See Ryder v. United States*, 515 U.S. 177 (1995). Furthermore, this case clearly has a wide-reaching effect on the citizens of New Jersey, all of its local subdivisions, the bondholders and others who relied upon the constitutionally affirmed system, *J. Filiberto Sanitation v. DEP*, 857 F.2d 913 (3d Cir. 1988), and not just the parties hereto. The Petition, transcending the merely "academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955), should be granted.

Respectfully submitted,

PETER VERNIERO
Attorney General of New Jersey
Attorney for Petitioner
Commissioner of the
New Jersey Department of
Environmental Protection

JAYNEE LAVECCHIA
ANDREA M. SILKOWITZ
Assistant Attorneys General
Of Counsel

GAIL M. LAMBERT
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